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Constitutional Law--Voluntary Confession

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(1953). In *State v. Wisman*, 98 W. Va. 250, 126 S.E. 703 (1925), it was held error to refuse the instruction that one cannot be found guilty of any offense higher or greater than that offense found by the first jury. This same principle was applied in *Green v. United States*, 355 U.S. 184 (1957), principally the case from which the reasoning was drawn in reaching the decision in the instant case. The *Green* case followed the view that is most consistent with the philosophy of the criminal law in not subjecting the defendant to repeated abuse and embarrassment, and compelling him to live in a continuing state of insecurity and anxiety.

The principal case illustrates the growing concern of the federal judiciary with the standards of criminal practice and procedure in the state courts. In view of the Supreme Court's present disposition to broaden the scope of the federal Bill of Rights so as to embrace more and more state actions, it would appear prudent for all state courts, prosecutors and law enforcement officials to follow closely the established federal procedures. The failure to do so carries with it the strong possibility of future reversals and the unnecessary release of hardened criminals.

John I. Rogers, II

Constitutional Law—Voluntary Confession

D had confessed to being guilty of rape. At his trial the determination of the voluntariness of his confession was made by the jury. He appealed on the ground that this procedure violated the due process clause of the fourteenth amendment. *Held*, affirmed. The Supreme Court of the United States has interpreted the due process clause as requiring the judge to make a determination of the voluntariness of the confession. However, Georgia law, which vests the trial judge with unquestionable power to review the case after conviction and to set aside the verdict if he is not satisfied with it, completely fulfills this requirement. Justice Almand, dissenting, stated that the procedure followed in this case is exactly the same as the procedure held unconstitutional by the Supreme Court of the United States. *Sims v. State*, 144 S.E.2d 103 (Ga. 1965).

It is clear under the fourteenth amendment that a conviction cannot stand if it was based on evidence which included an involuntary confession. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

Involuntary confessions are forbidden because of the likelihood that they are untrustworthy and because of the interest of society in protecting the individual's freedom of will. This freedom is sacrificed when an agency of the government wrings a confession out of an accused. *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960). There is a "deep rooted feeling that the police must obey the law while enforcing the law" *Spano v. New York*, 360 U.S. 315, 320-21 (1959). The consequence of basing a conviction on a coerced confession is always reversal. This is true although there was evidence apart from the confession sufficient to sustain the jury's verdict. Metzler, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 318 (1954).

The three basic procedural methods which have been used to determine the voluntariness of a confession are the orthodox, the Massachusetts and the New York rules. Under the orthodox procedure the judge determines the voluntariness of confessions. If the judge considers the confession voluntary, it will then be submitted to the jury. The jury considers all the circumstances surrounding the confession to determine whether the confession is true, but they have no power to reject the confession as involuntary. 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940).

Under the Massachusetts procedure the judge, after hearing all the evidence, decides whether the confession was voluntary. The judge makes a determination of the voluntariness issue even though there are factual issues over which reasonable men could differ. If the judge finds the confession voluntary, he admits it into evidence. However, the jury also must find the confession voluntary before it can consider the reliability of the confession. *Jackson v. Denno*, 378 U.S. 368, 378-79 (1964).

Under the New York procedure the judge makes only a preliminary determination as to the voluntariness of a confession. If the judge finds that under no circumstances could the confession be deemed voluntary, then he must exclude the confession from evidence. If there is a factual dispute concerning the voluntariness over which reasonable men could differ, the judge must leave the question of voluntariness to the jury. *Stein v. New York*, 346 U.S. 156, 172 (1953). Furthermore, the trial judge may set aside the jury's verdict if he believes it to be against the weight of the evidence. N.Y. CODE CRIM. PROC. §§ 465, 528.

Although the orthodox, Massachusetts and New York procedures are the basic procedures for determining the voluntariness of a confession, not every state and federal jurisdiction can be neatly classified as following one particular procedure. Many times it is difficult to ascertain from appellate court opinions which procedure the court is following. Moreover, some state courts rule differently on different occasions. *Jackson v. Denno*, *supra* at 378, n.9.

Recently, the New York procedure has been under attack on the theory that it violates the due process clause of the fourteenth amendment. This procedure was first attacked in *Stein v. New York*, 346 U.S. 156 (1953). The main issue which confronted the United States Supreme Court in *Stein* was whether the New York procedure failed to meet the standard of fair play which the Constitution demands. It was recognized that this procedure might be unfair to defendants because one does not know whether the jury made the critical determination regarding the voluntariness or whether they simply ignored the issue. However, the Supreme Court held the New York procedure constitutional. The holding was justified by a statement of alternate assumptions. The jury either (1) found the confession voluntary and properly relied on it or (2) deemed the confession involuntary and ignored it. 33 *FORDHAM L. REV.* 86 (1965).

The landmark case of *Jackson v. Denno*, 378 U.S. 368 (1963), expressly overruled the *Stein* case and held the New York procedure unconstitutional. In *Jackson v. Denno* the defendant robbed a hotel and shot a police officer. The defendant was wounded and taken to a hospital. Shortly thereafter he admitted having shot the policeman. After he had lost a great deal of blood and had been administered various drugs, he admitted that he had fired the first shot. The trial court used the New York procedure to determine the voluntariness of the confession. Because the factual issues surrounding the confession were such that reasonable men could differ, the issue as to voluntariness was submitted to the jury. The jury found the defendant guilty of first degree murder.

In determining not to follow *Stein*, the United States Supreme Court observed that the most obvious objection to the reasoning in the *Stein* case was that the jury would fail completely to consider the issue of voluntariness. However, assuming this problem could be remedied, the *Stein* decision was still wrong. It was wrong be-

cause it ignored the danger in which the defendant's rights are placed under either of the alternative assumptions. The assumption that the jury found the confession voluntary and properly relied on it is not satisfactory because it overlooks the possibility that the jury did not arrive at this conclusion objectively. Under the New York procedure approved in *Stein* the jury hears all the evidence, *i.e.*, the evidence on the issue of voluntariness and on the issue of truthfulness. Consequently, evidence that the confession is true may influence the determination of whether that confession is voluntary. It is unfair to let other matters pertaining to the defendant's guilt influence the jury in the determination of the voluntariness of a confession. *Jackson v. Denno, supra* at 381-87.

The alternate assumption in *Stein*, that the jury found the confession involuntary and properly disregarded it, is equally unsatisfactory. Mr. Justice White pointed out that if the jury finds the confession involuntary they are still likely to rely on it because of its trustworthiness. It is difficult for a juror to exclude the truthfulness of an involuntary confession from his mind when determining the defendant's guilt. *Jackson v. Denno, supra* at 388.

Furthermore, the New York procedure presents a problem concerning the record on appeal. Under this procedure there is no record of how the jury resolved the coercion issue. The record does not show whether, "the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it." *Jackson v. Denno, supra* at 379. Because of this shortcoming a petitioner does not know on which point to concentrate his attack when appealing the decision.

The Massachusetts and the orthodox procedures were approved in *Jackson v. Denno*. In both of these procedures the determination of voluntariness is made before the jury hears any evidence. The jury does consider voluntariness under the Massachusetts rule; however, they do not hear a confession unless the judge first determines it to have been voluntary. Furthermore, when either of these two procedures is used, the judge's finding on voluntariness will be on record. In effect, these two methods remove the possibility of undue prejudice against the defendant.

The dissenting opinions seriously challenged the rationale of the majority. Mr. Justice Black emphasized that to disregard the involuntariness of a confession because it is trustworthy is human

nature. This temptation haunts judges as well as jurors. *Jackson v. Denno*, *supra* at 402. Furthermore, Justice Black questioned the constitutional bases on which the majority rested the decision. *Jackson v. Denno*, *supra* at 407. His concept of due process was apparently much narrower than that of the majority of the justices. He maintained that the Supreme Court does not have the power to strike down a state trial procedure merely because that procedure is *unfair*.

Mr. Justice Harlan agreed with Mr. Justice Black's idea that the Supreme Court should not strike down time tested state procedures. *Jackson v. Denno*, *supra* at 427. He noted also that the majority's distrust of juries was in contrast with Supreme Court decisions in the past; the United States Supreme Court has rejected arguments that juries do or may disregard their instructions. *Opper v. United States*, 348 U.S. 84 (1954). To illustrate his point Justice Harlan set forth an intricate and complicated instruction presented to the jury in *Leland v. Oregon*, 343 U.S. 790 (1952), which the appellant argued may have confused the jury. The Supreme Court refused to recognize the possibility of the jury's inadequacy in *Leland*. Justice Harlan observed that in *Jackson v. Denno* the facts and instructions were far more simple. *Jackson v. Denno*, *supra* at 430-33.

The interpretation of *Jackson v. Denno* in the principal case is not consistent with the expanding concept of the due process clause of the fourteenth amendment. The procedure used in the principal case has the same weaknesses inherent in the New York procedure. In fact, the appendix to Justice Black's dissent indicated that Georgia employed the New York procedure. *Jackson v. Denno*, *supra* at 415.

It is interesting to note that the Supreme and Superior Courts of Pennsylvania have recently adopted a rule of criminal procedure, effective September 15, 1965, which is designed to follow and implement the decision in *Jackson v. Denno*. PA. R. CRIM. P. 323. The rule requires an advance determination by the court of the admissibility of a confession. If the court decides that the confession is admissible, then the issues of both voluntariness and credibility are submitted to the jury for determination of guilt.

The West Virginia courts will not have to change their procedure for the determination of voluntariness. The procedure applied in

West Virginia is the same as the orthodox rule which was expressly approved in *Jackson v. Denno*. The West Virginia Supreme Court has held that, before admitting a confession into evidence, a trial judge must determine from the evidence that the confession was voluntarily made. *State v. Vance*, 146 W. Va. 925, 124 S.E.2d 252 (1962); *State v. Brady*, 104 W. Va. 523, 140 S.E. 546 (1927).

Menis Elbert Ketchum, II

Criminal Law—Due Process and the Statute of Limitations

D was arrested seven months after he allegedly sold narcotics to an undercover policeman. At the trial *D* was convicted of a narcotic's violation solely upon the testimony of the undercover policeman. *D* denied the sale but was unable to find any other defense as he remembered nothing at all of what he had done on the day the sale allegedly occurred. The undercover policeman needed notes to refresh his memory. The court held that *D* was denied due process because the long delay between the time the prosecution's case was completed and the time *D* was arrested deprived *D* of a fair opportunity to defend even though prosecution commenced before the statute of limitations expired. *Ross v. United States*, 349 F.2d 210 (D. C. Cir. 1965).

The court appears to have set a precedent in rejecting the time set forth in the statute of limitations where constitutional guarantees are involved. The court holds in effect that the maximum time set forth in the statute for commencing prosecution may be diminished where there would be a denial of due process if the statute of limitations were literally applied.

The problems that faced the court in the principal case arise from a method of police investigation into the so-called "victimless" crimes. The crimes are generally narcotics offenses, prostitution, sodomy, liquor sales and gambling. The method often used by police in detecting these crimes involves an undercover man—either a plain clothes policeman or a police informer. The undercover man tries to establish himself in an area where he suspects these crimes are being committed. Once established and trusted, he hopes that someone will invite him to commit one of the crimes, or that he may witness the crimes as they are committed.